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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. 233

RICE BROS., A PARTNERSHIP CONSISTING OF CHARLES R. RICE, WM. J. DOWNEY AND JOHN J. DONOHUE,
Petitioner,

vs.

E. H. BIRMINGHAM,
Respondent.

ON PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA.

MOTION OF NATIONAL LIVE STOCK EXCHANGE, CHICAGO, ILLINOIS, FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF AMICUS CURIAE.

NATIONAL LIVE STOCK EXCHANGE,
Movant.
By FRANCIS X. BUSCH,
Its Attorney.

TAYLOR, MILLER, BUSCH & MAGNER,
Room 1400—134 South La Salle Street,
Chicago, Illinois,
Of Counsel.

THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

IN THE

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Now comes the NATIONAL LIVE STOCK EXCHANGE, by Francis X. Busch, its attorney, and moves the Court for leave to file instanter herein a brief as *amicus curiae*, and in support of its said motion shows:

(a) The National Live Stock Exchange is an unincorporated association. It was organized in 1885. Its offices are located at Chicago, Illinois. Its membership is composed of twenty-five (25) local livestock exchanges located at the twenty-five leading livestock markets of the United States.[1] Its purpose is to pro-

1. Buffalo, Chicago, Cincinnati, Cleveland, Denver, Detroit, Indianapolis, Jersey City, Lancaster, Los Angeles, Louisville, Memphis, Milwaukee, Montgomery, National Stock Yards, Ill. (St. Louis), Oklahoma City, Omaha, Portland, Sioux City, Sioux Falls, So. St. Joseph, So. St. Paul, San Francisco, Tulsa, and Wichita.

mote and serve (1) the development of the livestock industry, (2) the protection of all interests of the patrons of public markets, and (3) the advancement of the interests of its members.

(b) During the year 1946, sales of cattle, hogs, and sheep in the United States amounted in value to over seven billion dollars.[2] Of this amount it is estimated that sales in excess of two billion dollars were effected through "market agencies," of which the petitioner is typical, all operating under regulations of the Secretary of Agriculture and pursuant to the Packers and Stockyards Act. There are over 500 member firms engaged in the business of selling livestock on commission through movant's member exchanges. The receipt, handling and sale of thousands of head of cattle, hogs and sheep, at markets far removed from their point of origin or shipment present daily problems of magnitude. The press of business is tremendous; the demands for speed and efficiency in handling transactions most exacting. For example, on Monday, Oct. 20, 1947, at Chicago, Illinois, 13,500 cattle, 9,200 hogs, 2,000 sheep, and 1,000 calves were received. These were required to be penned, cared for, sorted, exposed for sale, and when sold, weighed and the proceeds of sale immediately accounted for. The total income to the particular market agency is an average commission of less than one-half (½) of one (1) per cent on gross value of live stock handled. There is neither time nor opportunity for title examination.

(c) Employing a construction of the Packers and Stockyards Act which, it is respectfully suggested, is contrary to its intent and purpose, the court below imposes a rule of liability on federally regulated market agencies engaged in the sale of livestock which does not, as a matter of settled law, exist in the case of other agencies whose business is affected by a public use, and this decisional regulation will unduly burden,

2. "Farm Income Situation." U. S. Dept. of Agriculture B.A.E. August-September 1947. Doc. L M S—7 dated October 3, 1947.

if not indeed obstruct, the free flow of interstate commerce.

(d) Movant is informed that there is presently pending in the State courts of Kansas, Colorado, Iowa, California, and in United States District Courts in Missouri and Kansas, a number of cases in which a question of law is presented substantially identical with that presented by the facts of the case at bar. The amounts in controversy are large and substantial. The decision of the Iowa Supreme Court in the instant case is at variance with the decision, on similar facts, of the Kansas City Court of Appeals of Missouri in the case of *Blackwell* v. *Laird, et al.*, 236 Mo. App. 1217, 163 S. W. (2d) 91. Liability, if any there is to be, of federally regulated "market agencies" rendering services to shippers in accordance with the mandate of the Packers and Stockyards Act, should not be made to depend on the local view of the individual State in which the interstate commerce is transacted. It was not the Congressional intent that the liability, if any, of a market agency located in Iowa and there engaged in the transaction of interstate commerce pursuant to the compulsions of the Act, should, on substantially identical facts, be different than the liability of a similar market agency located and similarly engaged in Missouri.

(e) Believing as it does: (1) that the decision of the Supreme Court of Iowa in the above entitled cause, imposes an unnecessary and unfair burden on a most vital area of the nation's interstate commerce and the federally regulated market agencies engaged therein; (2) will ultimately result in the promulgation of diverse State rules of law, and thus impair that uniformity of regulation which was intended by the Congress; and (3) overlooks or ignores the practical considerations inherent in the nature of the interstate commerce involved which operate to render the announced rule of law onerous and unfair, it respectfully moves the Court that it be granted permission to file the attached brief.

Application was made to the respective parties for their consent to the filing of the attached brief. Petitioner has consented. Respondent has declined its consent.

NATIONAL LIVE STOCK EXCHANGE,

By FRANCIS X. BUSCH,
Its Attorney.

Chicago, Illinois,

November 4, 1947.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. 233.

RICE BROS., A PARTNERSHIP CONSISTING OF CHARLES R. RICE, WM. J. DOWNEY AND JOHN J. DONOHUE,
Petitioner,

vs.

E. H. BIRMINGHAM,
Respondent.

STATEMENT.

Respondent Birmingham was a dealer in livestock. He owned cattle in his possession in his pens in the Sioux City, Iowa, Stockyards (R. 11). Petitioner, Rice Bros., a co-partnership, bought and sold livestock on commission at the Sioux Falls Stockyards, Sioux Falls, S. D. It was duly registered and licensed by the Secretary of Agriculture to engage in such business, as a Market Agency, at said Stockyards (R. 35).

On a day certain, at the said Sioux City, Iowa Stockyards, Birmingham sold fifteen (15) head of cattle to a stranger. The latter gave the name of John Brainman. Birmingham accepted in payment and without any investigation, a check drawn by Brainman on a bank located at Sioux Falls, S. D. (R. 27). Birmingham caused the cattle to be deliv-

ered to Brainman on the same day. The latter then employed a trucker, and the cattle were transported, Brainman accompanying them, from Sioux City, Iowa, to the yards of the Sioux Falls Stock Yard Company at Sioux Falls, S. D. There they were ordered delivered by Brainman to the pens of the petitioner, Rice Bros. (R. 29, 31). The following day petitioner, Rice Bros., pursuant to direction sold the cattle for the account of Brainman and promptly accounted for and paid over the proceeds of sale to Brainman, before any notice had been received that Brainman had an imperfect title to the cattle (R. 33). For its service as Market Agency petitioner received $12.00 (R. 33). Several days later, Brainman's check, payable to Birmingham, was returned dishonored. There was no such person, nor any such account (R. 12).

On the theory that no legal title to the cattle had passed from Birmingham to Brainman, respondent Birmingham sued Rice Bros. for damages for conversion. The trial court found a verdict for Rice Bros., petitioner. The Iowa Supreme Court, dividing 5-4, has reversed and directed a judgment against Rice Bros. and in favor of the respondent Birmingham. Certiorari was denied October 13, 1947. Petitioner has applied to this Court for a rehearing.

ARGUMENT.

Where the nature of an agent's calling is such that he is required by law to serve all who apply he is not liable for a conversion innocently performed. It has long been a settled principle of the law of agency that where the nature of an agent's business or calling is such that he is required *by law* to serve *all* who may require his services or facilities, he is not liable, in the absence of notice, for a conversion of the property entrusted to and dealt with by him, though his principal be not the rightful owner. This is a settled *exception* to the general rule concerning the liability of agents who deal with chattels to which their principal may have no title. The most conspicuous example of the exception is the case of carriers. *Hall* v. *Cumberland Pipe Line Co.*, 193 Ky. 728, 733, 237 S. W. 405, 408; *Shellnut* v. *Central of Georgia R. R.*, 131 Ga. 404, 62 S. E. 294; *Nanson* v. *Jacobs*, 93 Mo. 331, 6 S. W. 246; *Johnson* v. *C. B. & Q. Ry.*, 70 Neb. 364, 97 N. W. 479, 482; *Moore*, Carriers (2d ed.), pp. 283-284. But the exception is not limited to carriers. Carriers have been merely the traditional illustration of the rule. The important circumstance is that the nature of the calling is one affected by public use. In a State where tobacco raising is a vital commerce the exception has been invoked in favor of public warehousemen selling tobacco for the producers thereof—a function identical with that of the petitioners herein. *Abernathy* v. *Wheeler*, 92 Ky. 320, 17 S. W. 858; *Fields* v. *Blane* (Ky.), 18 Ky. L. 675, 37 S. W. 850. It has been applied to warehousemen selling cotton—*Roanoke Banking Co.* v. *J. E. Dunson Bros. & Co.*, 30 Ga. App. 341, 117 S. E. 826. It was applied, anciently, to a "job teamster," because he was, in a small way,

a common carrier and could not legally refuse to transport property such as he usually carried. *Gurley* v. *Armstead* (1889), 148 Mass. 267, 268, 19 N. E. 389, 390. A companion exception is now, after much disagreement, equally well settled in the commerce of securities. In such commerce a broker, because he is regarded as a mere conduit between the seller and the purchaser, for which service he receives a small commission, and because he has little or no means of warning or inquiry, is not liable in conversion for the sale of securities though his principal have no title. See *Gruntal et al.* v. *National Surety Co.*, 254 N. Y. 468, 474, 173 N. E. 682, 684; *Restatement*, Agency, § 349-350 (g), p. 769. Distinguished writers in the field of Agency have urged that innocent agents should be protected, even where the thing sold is an ordinary chattel.*

In all such cases, the exception is bottomed upon two primary considerations. *First*, the public interest in obtaining an unobstructed flow of commerce through or by means of the conduits involved. *Second*, a recognition of the principle, that, to deprive such agents of the right to select with whom and at what rate they may deal, and at the same time require them to insure the honesty of the customers thrust upon them by the law, would not even approximate justice.

If there be anything that may be said to be settled for the purposes of the case at bar, it is that stockyards commission men, situated as is the petitioner, Rice Bros., in this case, are an integral part of the conduits through which pass the nation's great flow of interstate commerce in livestock. It was on that specific theory that the validity of the Packers and Stockyards Act was sustained in *Stafford* v. *Wallace*, 258 U. S. 495, 516. It was there further said

* "Conversion by Innocent Agencies," Prof. Walter W. Cook, 28 Yale Law Journal 175.

that such commission men were indispensable to the continuity of the current of such commerce. And it was further pointed out that sales made by livestock commission men, though creating a local change of title were *not* "merely local transactions." *Stafford* v. *Wallace*, 258 U. S. 495, 516. Livestock commission men, therefore, like carriers, warehousemen and securities brokers, are mere conduits. They do not purport to deal with the property in any but the most fleeting manner.

Laws enacted by the Congress pursuant to the Constitution become the supreme law of the land.

When the Congress, by its enactment of the Packers and Stockyards Act, declared it to be the law of the land, that commission men, being part of the conduits of the nation's interstate commerce in livestock, were engaged in a pursuit affected by a national interest, it thereby established the status of the commission man as such for the purposes of all courts, State and Federal.

And, in interpreting the Packers and Stockyards Act, it must be presumed that the Congress, when it enacted the Act, was familiar with the aforesaid exception to liability then long existing in the case of agency functions affected by a public use. It is a familiar principle of statutory construction that a legislature is presumed to have acted with full knowledge of judicial decisions under the pre-existing law. *Thompson* v. *United States*, 246 U. S. 547, 551; 59 C. J. § 600. From the circumstance, therefore, *that the Act nowhere declares the contrary*, by necessary implication, it must be concluded that the Congress contemplated and intended that in construing the Act and determining its effect upon both the rights of the public and the agencies, that the logical consequence of declaring livestock commission men to be agents engaged in a business affected by a public use, would be that the aforesaid well-established

exception would follow along with the Congressional declaration. That, so interpreted, the Act would be given effect in all proper cases and in *all* courts, State and Federal. This is the obvious interpretation to be placed on and intent to be attributed to, the statute. It is respectfully insisted that the only logical and practical construction to be placed upon the Packers and Stockyards Act is this: When the Congress deprived the livestock man of his right to select his own customer *it thereby similarly deprived the courts of the several States of the right, for purposes of their decisions therein, to treat him as if he were an agent who could select his own customer.* In effect, the Congress said to the commission man: "You are no longer free to select your own customers; you must serve indiscriminately all who apply." And it said to the several States: "You must henceforth, for the purposes of your decisions, treat him as a factor whose business is affected by a public use and regulated in the interest of the free flow of interstate commerce." The Congressional determination is as binding on the States as it is on the commission man.

It should have been so interpreted and applied by the court below in the case at bar. The Act cannot be interpreted, as it has by the court below, to mean that each state of the United States, is at liberty to say, if it likes, that such market agencies were deprived of their right (1) to select their own customers, (2) required to render services at rates fixed by the Secretary, and (3) to furnish security for the performance of their financial obligations, and *in addition,* become insurers of the good faith and honesty of the customers thrust upon them by the mandate of the law! Such an interpretation of the Act plainly deprives them of property without due process of law. Congress did not intend that either it or the States

should impose an unconstitutional burden upon commission men.

It has been suggested by Respondent (Rsp. Br. p. 6), that because Section 308 of the Act (7 U. S. C. § 209) imposes a liability on registered agencies for certain violations of the Act, provides further that such liability may be enforced either by complaint to the Secretary or by suit in federal courts, and that such actions should not abridge or alter remedies existing at common law, that an intent may be inferred on the part of Congress to negative the exception to liability first above referred to. This is erroneous. The particular section referred to relates *only* to the right to employ both common-law or statutory remedies *for violations of the Act.* That proposition was long ago settled by this court's interpretation of the Interstate Commerce Act, from which this particular section was borrowed. In the case of *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, where the identical clause was being construed, this court said (p. 446):

> "The clause is concerned *alone* with rights recognized in or duties imposed by the Act, and the manifest purpose of the provision in question was to make plain the intention that any specific remedy given by the Act should be regarded as cumulative when other appropriate common-law or statutory remedies existed *for the redress of the particular grievance or wrong dealt with in the Act.*" (Italics ours.)

The rule of the majority opinion below imposes a practical and not a theoretical burden on the free flow of interstate commerce. Commission men located at stockyards are required to deal with cattle far removed from their point of shipment. In the case of a shipment of cattle from Texas to Kansas City or Chicago, by what means may a commission man, whose only implements of trade are "a horse on which he rides and a desk on which he keeps his

accounts,"* conduct an investigation into the title of the chattels sent to him? Must the free flow of those transactions which engender no suspicion be impeded, while, to avoid the financial consequences of the rule imposed by the Court below, the commission man is engaged in running down the identity, title and responsibility of every customer who ships cattle for sale? The financial responsibility involved in that interpretation of the Act which would require such commission men to insure the integrity of *all* persons sending cattle to them for sale, is by no means commensurate with the rate of commission permitted to them by the Secretary. Nothing was suggested in the court below as to what the petitioners in this case should have done when Brainman drove the fifteen (15) head of cattle into its yards at Sioux Falls, S. D., and then directed them to be sold for his account. On the other hand, respondent was not compelled to sell to a stranger without investigating the worth of the check handed in payment. The rule of law of the majority below rewards the negligent. Any regulation imposed by petitioner effective enough to have frustrated Brainman's scheme in this case would have to have been so thorough as to obstruct the very thing the Act was seeking to facilitate and be so complete as to make the regulation unreasonable.

If the free flow of livestock from farm to market is to continue unobstructed as the Congress intends, then we earnestly suggest that the rule of law appertaining to agents engaged in the sale of livestock should be the same as it is for carriers, warehousemen and for brokers engaged in the securities business. What sound reason can be suggested why a carrier, transporting cattle from a

* *Moorhead & Tagg Bros.* v. *U. S.*, 280 U. S. 420, 437.

railroad station in Texas to a stockyard in Chicago, should be relieved of liability, if its shipper be later discovered to be not the rightful owner, on the theory that it was a mere conduit and in the exercise of its public calling, but the commission man, far removed from the point of shipping origin, having no facilities for inquiry and by force of this court's decision equally a conduit, be liable? After livestock has been placed in the rapidly moving stream of interstate commerce, it should, at least for purposes of claims of the type asserted in the case at bar, be regarded as negotiable as the securities offered for sale in Wall or LaSalle Streets. Commission men in cases arising out of such circumstances as are present in the case at bar should have no other or different financial responsibility.

Federal regulation contemplated by the Act is so exclusive and so complete that in the interest of uniformity alone such regulation should not be obstructed or burdened by diverse local views. The policy of a statute which Congress has enacted under its constitutional power to regulate interstate commerce may not be defeated or obstructed by State law, whether decisional or statutory. *Philco Corp.* v. *Phillips Mfg. Co.*, 133 F. (2d) 663, 671; *Texas and Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Second Employers Liability Cases*, 223 U. S. 1, 53-55; *Postal Telegraph-Cable Co.* v. *Warren Godwin Co.*, 251 U. S. 27, 30.

Entirely apart from the proposition that the Congress, in the exercise of its constitutional power to regulate interstate commerce, has by its Act, now occupied the field to the exclusion of all but the most minor of State regulations, and it is therefore improper for a State to enter it either by decision or by statute, one of the primary purposes of the

Packers and Stockyards Act is the uniformity and centralization of regulation achieved thereby. It was said of the Act, when reported to the Congress, that it gave "the Secretary of Agriculture complete *inquisitorial, visitorial, supervisory* and *regulatory* power over the packers, stockyards and *all activities therewith;* that it is a most comprehensive measure and extends farther than any previous law in the regulation of private business, in time of peace, except possibly the Interstate Commerce Act."* (Italics ours.) Such uniformity of regulation contemplated by the Act will be seriously endangered and as well the social aims sought to be thereby achieved frustrated, if the philosophy of construction on which the decision below depends is permitted to stand.**

It is respectfully submitted that the implications of the instant case are of such importance to the federal pattern

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* H. R. Rep. No. 77, to accompany H. R. 6320, 67th Cong., 1st Sess.

** Referring to the opinion of the Iowa Supreme Court (26 N. W. (2d) 39) in the case at bar, and to the opposing arguments considered therein it has been said: *Columbia Law Review, Vol. 47, July, 1947—No. 5*: "The choice between these arguments must be bottomed on considerations of social convenience. The legislative policy expressed in the Packers and Stockyards Act aimed to remove obstructions to the flow of commerce in the meat industry. To demand that the agent investigate the source of his principal's title in all cases, may impede materially the vast majority of transactions in which the title is unquestionably valid. Secondly, since the agent must serve all reasonable requests without discrimination, his freedom to investigate, while not destroyed, is inhibited by the fear that his examination of his principal's title may be characterized as discriminatory, leading to his suspension. Finally, the Act, by rendering the agent's fees subject to administrative regulation, makes it difficult for him to spread the risk of loss by increasing the price of his services. It would seem that the decision of the Iowa court in the instant case, while well buttressed by authority, fails to give adequate weight to the social aims which the Packers and Stockyards Act was intended to serve."

of regulation as to justify the granting of the writ of certiorari in the case at bar.

Respectfully submitted,

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